

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES GILSTRAP)	
Claimant)	
)	
VS.)	
)	
WICHITA STEEL FABRICATORS, INC.)	
Respondent)	Docket No. 1,026,335
)	
AND)	
)	
ACE PROPERTY & CASUALTY INS. CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the January 25, 2006 preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

The ALJ granted claimant's request for medical benefits and temporary total disability benefits after concluding claimant established an accident arising out of and in the course of his employment with respondent.

Respondent appealed this Order as it contends the more persuasive evidence is that claimant injured his back at home and not at work. For that reason, respondent contends the ALJ's preliminary hearing Order should be reversed.

Claimant argues the Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

At issue in this claim is whether claimant met his burden of showing he sustained an accidental injury arising out of and in the course of his employment with respondent on October 10, 2005.¹

Distilled to its simplest terms, the evidence indicates that claimant sustained a work-related injury on October 10, 2005 while cutting pieces of heavy metal into scrap. Claimant says he lifted a piece of the scrap and felt an immediate onset of pain in his low back. The scrap fell to the floor and he tried to walk off the pain. He did not tell his supervisor on that day, believing the problem would subside with rest. The next day he had a conversation with Phil Frost, his supervisor, and mentioned the injury the day before and the resulting pain in his back. Mr. Frost testified that claimant complained of back pain on October 11th, but there was no mention of a relationship to work. Rather, Mr. Frost suggested claimant's pain was related to having sex with his wife. Claimant admits Mr. Frost suggested his back pain was from sex, but claimant maintains he attributed his condition to work.

Another witness testified that while claimant did complain of back pain on October 10, 2005, claimant attributed the pain to lifting boxes in his garage.

The first medical record included within the record includes a reference to an injury that occurred "while picking up something heavy."² Several weeks later claimant's treating physician filled out a form provided by the Division of Workers Compensation and indicated claimant's accident occurred when he "lifted something heavy".³ That same form includes the words "hurt while lifting boxes."⁴ There is no dispute that claimant does not lift boxes at work, although claimant explained that the scrap metal he cuts is deposited in a bin that possibly could be referred to as a box.

After a rather lengthy preliminary hearing during which the ALJ had the opportunity to observe and evaluate the credibility of each of the witnesses, the ALJ found in claimant's favor. She expressly found claimant "established that it is more probably true than not true, that he was injured while working for the respondent, and that his injuries arose out of and in the course of his employment".⁵

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

¹ Notice is not disputed.

² P.H. Trans., Ex. 1 at 1.

³ *Id.* at 5.

⁴ *Id.*

⁵ ALJ Order (Jan. 25, 2006) at 1.

right depends.⁶ “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁷

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁸

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁹ Whether an accident arises out of and in the course of the worker’s employment depends upon the facts peculiar to the particular case.¹⁰

The two phrases arising “out of” and “in the course of” employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase “out of” employment points to the cause or origin of the worker’s accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises “out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer’s service.¹¹

Resolution of this issue turns largely upon credibility, an aspect of the case that the ALJ is in a unique position to evaluate. And the Board often defers to the ALJ in such instances. Respondent contends that claimant’s credibility is so damaged by

⁶ K.S.A. 2005 Supp. 44-501(a).

⁷ K.S.A. 2005 Supp. 44-508(g).

⁸ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778 (1991).

⁹ K.S.A. 2005 Supp. 44-501(a).

¹⁰ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

¹¹ *Id.*

inconsistencies and inaccuracies in his testimony and the lack of corroboration, that the ALJ erred when she concluded claimant met his burden of proof to establish a work-related accident. Respondent maintains claimant hurt his back either lifting boxes at home or while having sex, but in no event did the injury occur at work. Claimant denies ever suggesting that his injury occurred in any manner other than while cutting scrap metal at work.

The Board has reviewed the record and finds the ALJ's preliminary hearing Order should be affirmed. The Board concludes claimant met his burden to establish an injury that arose out of and in the course of claimant's employment on October 10, 2005. Although there are alternative explanations for the injury, the ALJ found those to be less persuasive than claimant's own testimony and the initial medical records from October 17, 2005. The Board finds the ALJ's conclusion to be justifiable and based upon the record developed to this point, concludes that her conclusion should not be disturbed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.¹²

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated January 25, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2006.

BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Vince A. Burnett, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹² K.S.A. 44-534a(a)(2).